No. 848

In the Supreme Court of the United States

OCTOBER TERM, 1941

MARY W. STEWART ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court (R. Vol. I, pp. 165–176) is reported in 29 F. Supp. 59. The opinion of the Circuit Court of Appeals (R. Vol. V, pp. 148–169) is reported in 121 F. (2d) 705.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 30, 1941 (R. Vol. V, pp. 169–170). A petition for rehearing was denied October 16, 1941 (R. Vol. V, p. 170). The petition for a writ

of certiorari was filed January 8, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a Mexican grant of Mare Island, "in all its extent," which was confirmed in 1855 by the Board of Land Commissioners as an island "bounded by the water's edge," included all lands above the line of ordinary high tide.

2. Whether a prior suit to which the United States was not a party and in which it was held that petitioners' predecessors in interest were entitled to possession of the lands in suit, established a rule of property which forecloses the United States from now asserting its title.

3. Whether the Act of March 3, 1891, which provides that suits to vacate and annul patents to land must be brought within six years after their issuance, in a suit brought after the six-year period bars the cancellation of patents for lands the disposal of which was not authorized by Congress.

4. Whether the United States is estopped from suing to quiet title to its lands because the petitioners have improved and long been in possession of the lands under patents issued by the United States, where Congress never authorized issuance of the patents or relinquishment of the rights of the United States and the petitioners at all times

had means of knowing of the infirmities in their claim of title.

STATEMENT

This is a companion suit to *United States* v. *O'Donnell, et al.*, 303 U. S. 501, and was brought to quiet the Government's title to an area of tule marsh lands lying contiguously northwest of the "O'Donnell" lands on Mare Island in San Pablo Bay, California.

In the *O'Donnell* case, this Court held that the validity of the Castro grant—under which the United States asserts ownership to the whole Island[1]—is no longer open to question, and upheld the title of the United States to the marsh lands there involved. 303 U. S. at pages 508, 514. In the present case, petitioners, like the defendants in the *O'Donnell* case, claim as patentees from California under the Swamp Lands Act of September 28, 1850, c. 84, 9 Stat. 519. While they do not now challenge the validity of the Castro grant, petitioners renew the contention made and over-

[1] Although the Government's ownership of the lands in both cases is claimed under a common title, separate suits were filed because the adverse claimants in each case claimed under separate swamp land surveys by the State of California and also because petitioners in the present case asserted certain "affirmative defenses" (R. Vol. I, pp. 37, 70–82, 83–93, 94–95, 131–153) which were not advanced by the claimants in the *O'Donnell* cases. Petitioners' statement (Pet. 8) that "the issues decided in the *O'Donnell* case are entirely different from those presented here," therefore, can have reference only to their affirmative defenses based on the statute of limitations and equitable estoppel.

ruled in the *O'Donnell* case[2] that none of the tule marsh lands was included within the grant, because the marsh lands were not within the area commonly known by the name "Mare Island" when the grant was made or in 1855 when it was confirmed by the Board of Land Commissioners. Petitioners also contend that even though the lands were within the confirmed grant, the United States is barred from asserting its title because of its acquiescence in petitioners' claim of ownership, its laches in bringing suit, and the issuance of patents covering some of the lands involved more than 6 years earlier than the date when the instant suit was brought, which is the statutory period of limitations for suits by the United States to annul patents.

The facts essential to the understanding of the case may be summarized as follows:

Title acquired by the United States.—As shown on the sketch contained in the opinion below (R. Vol V, p. 149) and reproduced as a frontispiece to this brief, Mare Island consists of an area of uplands at its southern extremity, to the north of which is a narrow neck or isthmus of reclaimed swamp lands that joins with a larger area of lowlands on the north extending out fanwise toward the mainland. The lands comprising the narrow isthmus were involved in the *O'Donnell*

[2] See Brief for Respondent, pp. 22–23, 31–45, and Reply Brief for United States, pp. 18–40, No. 487, October Term, 1937.

case; the lowlands to the north are the lands in suit.

The grant by Alvarado, Governor General of California, to Castro in 1841 was for the island of "La Yegua" (Mare Island) "in all its extent" (R. Vol. I, pp. 21, 165, 260). By mesne conveyances, Bissell and Aspinwall succeeded to Castro's title and presented it for confirmation to the Board of Land Commissioners established by the Act of March 3, 1851, c. 41, 9 Stat. 631 (R. Vol. I, p. 260). The Board confirmed the Castro grant in a decree dated May 8, 1855, which provides (R. Vol. V, p. 70):

> The place of which confirmation is hereby given is situate in the Bay of San Francisco and is called "Isla de La Yegua" or Mare Island and being an Island is bounded by the water's edge.

While the confirmation proceeding was pending, the United States, on January 4, 1853, purchased from Bissell and Aspinwall "all that tract of land and Island called and known as Mare Island * * * including all the Tule or low land and Marsh belonging to the same or which has ever been reputed or claimed to belong to the same" for a consideration of $83,491.00 (R. Vol. III, pp. 70–74). A month later, President Fillmore, by Executive order, reserved the Island "together with all its appendages of Tule or Marsh land" for use as a Navy Yard and Naval Depot (R. Vol. III, pp. 58–60).

Appellees' claim under the Swamp Lands Act.— By the Swamp Lands Act of September 28, 1850, c. 84, 9 Stat. 519, the United States granted to California the swamp and overflowed lands within her borders which were not privately owned; and nineteen years later, on June 25, 1869, at the request of one Hinckley, a survey was made of the lands in suit by the county surveyor of Solano County (R. Vol. IV, p. 37). On April 7, 1874, California issued its patent to Hinckley's assignee, from whom stems the petitioner's claim of title (R. Vol. III, pp. 185–187).

Nine years later, in 1883, petitioners' predecessors in interest brought an action in ejectment against the Commandant of the Navy Yard to obtain possession of the lands. The Commandant, who was represented by the United States Attorney and a Special Assistant appointed at his request by the Attorney General (R. Vol. III, p. 203), defended on the ground that the state patent conveyed no title because the Secretary of the Interior had not segregated and identified the lands as swamp and overflowed lands, and on the further ground, *inter alia,* that title was in the United States under the Castro grant. Mr. Justice Field, sitting on circuit, and Judge Sawyer held, however, that since the Swamp Lands Act was a grant *in praesenti,* the absence of a segregation could not defeat plaintiffs' title and they were entitled to show the character of the land by parol evidence.

That evidence showed that the lands were below the line of ordinary high tide,[2] and the lands, therefore, were held not to have been included within the Castro grant, because that grant was "only to the island, 'bounded by the water's edge' " and could not extend beyond ordinary high tide. Judgment was accordingly entered against the Commandant. *San Francisco Sav. Union* v. *Irwin*, 28 Fed. 708 (C. C. Cal.). The judgment was affirmed by this Court on the authority of *Wright* v. *Roseberry*, 121 U. S. 488, which dealt with the question of the effect of the absence of a segregation by the Secretary of the Interior. 136 U. S. 578.

By the affirmance of the judgment, officers of the Navy Department felt that the title of the United States "was lost" (R. Vol. III, pp. 262, 264), and when Dr. L. E. Cross went into possession of the lands six years later and asked the Commandant for permission to employ a Navy Yard surveyor to locate the southern boundary of his claim, the Commandant agreed with the hope "that the boundary line once established may be done so accurately that no objection will ever be raised by either of the parties interested therein" (R. Vol. III, pp. 690–692). That same year, 1896, and again in 1910 and 1924, patents were issued by the United States to California covering, in the

[2] The petitioners in the instant case have admitted and do not now deny that the lands here involved were above ordinary high tide (see pp. 9–10, 12, *infra*).

aggregate, all of the lands in suit (R. Vol. III, pp. 189, 192, 196.)

Petitioners' predecessors thereupon commenced construction of levees to reclaim the lands "for general agricultural purposes, stock raising" (R. Vol. II, p. 529). In recent years the northwest portion has been used "mostly for gun clubs," or "duck clubs" (R. Vol. II, pp. 631–632, 637). Dr. Cross' son lived on the lands with his family and workmen from 1898 to 1907 (R. Vol. II, pp. 526, 532, 689), and a farmer named Harold Casebolt testified that he has lived there for seven years (R. Vol. II, pp. 635–637). The record does not disclose that anyone else has lived on this land. The Pacific Gas & Electric Company has erected power lines "across the northern section of the gun club" (R. Vol. II, pp. 632–633, 636) under a right-of-way and easement obtained from Dr. Cross in 1911 (R. Vol. I, p. 160).

Proceedings below.—The United States brought this suit to quiet title on April 22, 1930, but trial was postponed to await a final decision in the *O'Donnell* case. At the trial, the only issue, apart from petitioner's affirmative defenses, was the same as that raised in the *O'Donnell* case, namely, whether there was only one island, as the Government contended, or two islands, as petitioners claimed. The trial judge, who also had presided at the trial in the *O'Donnell* case, held for the petitioners, thus reaching a result directly contrary to his conclusion upon

substantially identical evidence in the *O'Donnell* case (R. Vol. I, pp. 257–258, 279); without undertaking to state definitely where he thought Mare Island began or ended, he held that none of the lands in suit ever was a part of Mare Island (R. Vol. I, p. 261). His opinion shows that, notwithstanding petitioners' concession that they could not acquire title by adverse possession as against the United States, he based the decree chiefly upon the ground that even if the lands were included in the Castro grant, petitioner's "open, exclusive, continuous possession * * * preclude the Government from ever establishing its claim to ownership" (R. Vol. I, pp. 175–176).

The trial court also held (R. Vol. I, p. 176), as to the lands for which patents were issued in 1896 and 1910, that the present suit is barred by the Act of March 3, 1891, Sec. 8, c. 561; 26 Stat. 1095, 1099, which requires suit to be brought within six years after the issuance of a patent. The court stated (R. Vol. I, p. 169) that it was unnecessary to discuss the merits of the affirmative defenses that a public boundary divides Mare Island from the lands claimed by petitioners,[1] and that the United States is estopped from asserting its title.

The Circuit Court of Appeals reversed (R. Vol. V, pp. 169–170). The majority held that the con-

[1] Petitioners have abandoned this defense in this Court. The court below held that it was "too far-fetched to warrant extended comment" (R. Vol. V, p. 163).

firmatory decree of May 8, 1855, conclusively established the Government's title to all land above mean high water, and that since it was undisputed that the marshlands were all above that line (R. Vol. V, pp. 155, 167), title to the entire area was vested in the United States (R. Vol. V, pp. 157–158). The court also held that the Act of March 3, 1891, did not bar cancellation of the patents issued in 1896 and 1910 (R. Vol. V, pp. 161–162), and that under the rule that the United States could not be prejudiced by unauthorized action of its officials or laches, the suit was not barred in equity (R. Vol. V, pp. 163–166).

Judge Denman, concurring, stated that he did so "despite the grossly inequitable result arising from the Government's reliance on its freedom from the defense of laches," and expressed the view that this "is peculiarly a case for Congressional remedial action, beyond the equitable powers of this court" (R. Vol. V, p. 166). Judge Mathews, who dissented, did so upon the ground that the trial court found, in effect, that the lands in suit were not a part of Mare Island at the tim of the grant to Castro or at the time of the confirmation decree in 1855 and that this finding was supported by evidence (R. Vol. V, pp. 167–168).[5]

[5] The court below held that the land east of Boat Cut-off or Dutchman's Slough (see frontispiece map) was not a part of the Castro grant, since Boat Cut-off was found to be a navigable waterway. It affirmed the judgment of the district court with respect to this land (R. Vol. V, pp. 158–161). The Government has not appealed from this holding.

ARGUMENT

The decision of the Circuit Court of Appeals is correct and presents no conflict or other reason calling for a review.

1. Petitioners contend that the court below erred in holding that the lands in suit were a part of Mare Island and were embraced within the Castro grant which was confirmed in 1855 (Pet. 10, 12, Br. 35–41). However, the decree of confirmation, *supra*, p. 5, specifically described the area confirmed as "bounded by the water's edge." Such a description, as the court below pointed out (R. Vol. V, p. 156), has invariably been held to refer to the line of ordinary high tide.* *Borax, Ltd.* v. *Los Angeles*, 296 U. S. 10, 22–25; *Shively* v. *Bowlby*, 152 U. S. 1, 29; *United States* v. *Pacheco*, 2 Wall. 587; *Teschemacher* v. *Thompson*, 18 Cal. 11 (1861); *Ward*

* The court below rejected the contention advanced by petitioners in that court to the effect that the boundary "water's edge" given in the decree must be determined under the civil law then prevailing in Mexico as being "the line reached by the highest tide during the year" (R. Vol. V, pp. 155–156). Following the uniform decisions of this Court and the courts of California, the court held that the confirmatory decree must be accepted as a common law instrument. See cases cited in text *supra*. The Government proved, moreover, that the elevation of the land in 1852 was from 1.4 to 2.5 feet above even the highest high tide (Ex. T, R. Vol. IV, p. 28; Vol. II, pp. 577–583, 586–597). The trial court made no finding as to the elevation of the lands above ordinary high tide and the Circuit Court of Appeals declined to "consider the factual argument beyond saying that the record leaves the matter substantially doubt" (R. Vol. V, p. 156).

v. *Mulford*, 32 Cal. 365 (1867); *More* v. *Massini*, 37 Cal. 432 (1869). The decree of confirmation thus stands as a conclusive determination that the Castro grant extended to all lands lying above that line. *United States* v. *Coronado Beach Co.*, 255 U. S. 472, 487–488; *Knight* v. *U. S. Land Association*, 142 U. S. 161, 184; *United States* v. *Hancock*, 133 U. S. 193, 196; *Higueras* v. *United States*, 5 Wall. 827, 830, 838. Since in the court below petitioners conceded and do not now deny that the evidence shows that the entire tule marsh area was above the line of mean high tide (R. Vol. V, p. 167), there is no basis whatever for their contention that the lands here involved were not included within the grant.

2. Nor is there merit to petitioners' contention (Pet. 9, 10–11; Br. 2–3, 5–14) that the legal title of the United States has been lost by the operation of "a rule of property" resulting from the decision in *San Francisco Sav. Union* v. *Irwin*, 28 Fed. 708 (C. C. Cal.), affirmed, 136 U. S. 578. Petitioners concede that the judgment in that case "is not *res judicata* as to the United States" (Br. 5, footnote). Moreover, as already stated, they have conceded that the evidence in the instant case shows that the lands were above the line of mean high tide, whereas the decision in the Irwin case was based on an opposite finding.[7]

[7] It is also to be noted (1) insofar as the *Irwin* case held that the plaintiffs could show the swamp land character of the land by oral testimony, it has "been repeatedly re-

If any prior adjudication is pertinent to the issue herein, it is the decision in the *O'Donnell* case. Upon evidence substantially the same as that introduced in the present case, this Court sustained the concurrent findings of the courts below that the tule marshlands there in question were not overflowed and hence were within the Castro grant. Since petitioners' contention that the lands here involved were not a part of Mare Island must fail if the lands in the *O'Donnell* case were not under water so as to form two islands, it amounts, in effect, to a collateral attack upon the decree in that case. And it is not supported by any new evidence or valid argument. Cf. *Kolb* v. *Swann*, 68 Md. 516, 13 Atl. 379 (1888); *Fernald* v. *First Church of Christ, Scientist*, 77 N. H. 108, 88 Atl. 705 (1913); *Sequatchie & S. P. C. & I. Co.* v. *Tennessee C., I. & R. Co.*, 131 Tenn. 221, 174 S. W. 1122 (1915); *United States* v. *Neleigh*, 1 Black 298, 305; *United States* v. *Grimes*, 2 Black 610, 612.

3. Likewise without merit is petitioners' contention (Pet. 9, 11; Br. 3, 14–18) that the Act of

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pudiated by the Supreme Court and can no longer be regarded as obtaining." *Sawyer* v. *Osterhaus*, 212 Fed. 765, 774, citing *Rogers' Locomotive Works* v. *Emigrant Co.*, 164 U. S. 559; *Michigan Land & Lumber Co.* v. *Rust*, 168 U. S. 589; *Brown* v. *Hitchcock*, 173 U. S. 473, 476; (2) insofar as it held that the United States could not acquire a valid title by adverse possession it was overruled in *Stanley* v. *Schwalby*, 147 U. S. 508, 517, in which Mr. Justice Field dissented; (3) insofar as it held that President Fillmore's reservation of the land for a navy yard was ineffective, it is contrary to the subsequent decision of Judge Van Fleet in *Sawyer* v. *Osterhaus*, *supra*.

March 31, 1891, Section 8, c. 561, 26 Stat. 1095, 1099, providing that suits by the United States to annul and cancel any patent must be brought within six years of its issuance, precluded cancellation of the swamp patents issued in 1896 and 1910 (R. Vol. V, pp. 161–162). That statute is "strictly a part of the public land laws" (*United States* v. *Minnesota*, 270 U. S. 181, 196) and is confined in scope to "public land of the United States," that is, to those lands "open to sale and conveyance through the land department." *United States* v. *Winona &c. Railroad*, 165 U. S. 463, 476; *United States* v. *Whited & Wheless*, 246 U. S. 552; *Newhall* v. *Sanger*, 92 U. S. 761; *La Roque* v. *United States*, 239 U. S. 62, 68; *Cramer* v. *United States*, 261 U. S. 219. The lands in suit were not of that character.

The Swamp Lands Act was a grant *in praesenti* and the lands in suit were held in private ownership when it was enacted. Accordingly, the Act did not pass them to California; it was effective to transfer the lands described in it "only so far as they were part of the public domain of the United States and thus subject to the disposal of Congress." *United States* v. *O'Donnell*, 303 U. S. 501, at 509. And since no other statute authorized the Land Department to dispose of the lands, petitioners' patents are "inoperative and void" (*Smelting Co.* v. *Kemp*, 104 U. S. 636, 641, 646; *United States* v. *Conway*, 175 U. S. 60, 68) and the issuance of them determined "no legal or

equitable right of the United States in the premises." *United States* v. *O'Donnell, supra,* at 508–509; *Work* v. *United States,* 23 F. (2d) 136, 138 (App. D. C.).

As the court below said, *United States* v. *Chandler-Dunbar Co.,* 209 U. S. 447, relied upon by petitioners (Pet. 15–18), "is readily distinguishable" (R. Vol. V, p. 162). In that case the lands were "in kind open to sale and conveyance through the Land Department" (209 U. S. at p. 450) under the Act of March 1, 1847, c. 32, 9 Stat. 146, which authorized the disposition of lands within the Lake Superior Land District to preemptors and script locators. See *United States* v. *Chandler-Dunbar Water Power Co.,* 152 Fed. 25, 33, 36. No such statute authorized the disposal of the lands here involved. Cf. *Lee Wilson & Co.* v. *United States,* 245 U. S. 24, 32.

4. Finally, petitioners contend that the United States should be denied relief both under "general principles of equity" (Pet. 10, 11–12; Br. 3–4, 19–31) and under the doctrine of equitable estoppel (Pet. 10, 11; Br. 4, 31–34). The trial court did not pass upon this contention (R. Vol. I, p. 169); the court below rejected it (R. Vol. V, pp. 163–166).

Petitioners' argument is, in substance, that the United States should be bound by the acts of its officers, upon which petitioners relied in purchas-

ing and improving the lands in suit, and should be bound also by their laches in bringing the suit. However, Congress never authorized the Secretary of the Navy, the Commandant of the Navy Yard, the General Land Office, or any other officer of the Government to relinquish the property rights of the United States in the lands in suit. In such circumstances, it is well established that the United States is not estopped to assert its title. *Utah Power & Light Co.* v. *United States*, 243 U. S. 389; *Lee Wilson & Co.* v. *United States*, 245 U. S. 24; *Jeems Bayou Club* v. *United States*, 260 U. S. 561; *Cramer* v. *United States*, 261 U. S. 219; *Standard Oil Co.* v. *United States*, 107 F. (2d) 402, 416 (C. C. A. 9), certiorari denied 309 U. S. 673; *United States* v. *Walker River Irr. Dist.*, 104 F. (2d) 334, 339 (C. C. A. 9). Nor may the United States be denied relief because of its delay in bringing suit or because of its officers' acquiescence in petitioners' expenditures for the purchase and improvements of the land. *United States* v. *Kirkpatrick*, 9 Wheat. 720, 735; *United States* v. *Beebe*, 127 U. S. 338, 344; *United States* v. *Nashville &c Ry. Co.*, 118 U. S. 120, 125; *United States* v. *Insley*, 130 U. S. 263, 266.

Contrary to the statement made in the concurring opinion of the court below (R. Vol. V, p. 166), the judgment may not be characterized as "grossly inequitable." As the court observed (R. Vol. V, p. 165), the rights of those claiming under the

state have been from the beginning "shrouded in doubt and uncertainty." See *San Francisco Sav. Union* v. *Irwin*, 28 Fed. 708 (C. C. Cal.), affirmed 136 U. S. 578; *Bouldin* v. *Phelps*, 30 Fed. 547 (C. C. N. D. Cal.); *Sawyer* v. *Osterhaus*, 212 Fed. 765 (N. D. Cal.); *Work* v. *United States*, 23 F. (2d) 136 (App. D. C.); *United States* v. *O'Donnell*, 303 U. S. 501. And petitioners and the companies which insured their supposed title (R. Vol. II, pp. 710–711) had means of knowing that Congress had not authorized relinquishment of the lands.

CONCLUSION

It is respectfully submitted that the petition should be denied.

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